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No. 89-12

In The

Supreme Court of the United States

October Term, 1988

Carita Richardson, By S.& E. Richardson, Guardians, et al.
Petitioners,

v.

Richardson-Merrell, Inc.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE BY ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42 of the Rules of this Court, applicant respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of the Petition for Certiorari in this case. Respondent, through counsel, has denied consent to the filing of this brief.

Applicant, the Association of Trial Lawyers of America, is a voluntary bar association of approximately 60,000 attorneys who primarily represent the injured victims of tortious misconduct.

Litigation of claims by injured victims frequently demands testimony by qualified experts to assist the jury in making factual determinations. The decision below, in which the U.S. Court of Appeals for the District of Columbia announced a new rule limiting the admissibility of expert opinion, is therefore of grave concern to ATLA members.

Applicant believes that its brief in this case will be of assistance to this Court. The Federal Rules of Evidence were designed to provide uniformity in all federal courts with respect to the admission of evidence. The decision below, departing from both the language of Rule 703 and the manner in which federal courts have heretofore applied that Rule, introduces uncertainty concerning the standards for expert testimony in a wide variety of cases. The nationwide impact of this ruling may not be fully addressed in the briefs of the parties in this case.

For these reasons, applicant respectfully moves the Court for leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

May a federal court exclude the testimony of an expert witness who is qualified and whose opinion is relevant and based on the type of facts or data reasonably relied upon by experts in the field, on the ground that the expert's conclusions are against the great weight of generally accepted scientific opinion in the field?

INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] is a voluntary association of approximately 60,000 attorneys who are primarily engaged in representing the injured victims of tortious misconduct. A plaintiff who alleges that he or she has been injured by wrongful conduct frequently must present expert testimony to assist the jury in making factual determinations, such as causation.

The Federal Rules of Evidence, promulgated by this Court and enacted by Congress, liberalized the rules governing the admissibility of expert testimony and provided uniformity in the application of those rules in federal courts. The decision by the District of Columbia Circuit, which imposes a new restriction on the admissibility of expert opinion and departs from the prevailing practice in other Circuits, is therefore a matter of serious concern to ATLA and its members.

In our complex society, we are exposed to dangers that often fall within the scope of expertise of a small number of specialists. Research in these fields is frequently dominated by large corporate enterprises who, in turn, may

be defendants in suits by injured victims. In essence, the court below takes from the jury the responsibility for assessing the credibility of expert opinion and places it in the hands of an undefined "consensus" of scientists, whose conventional wisdom may well be responsible for the hazard in the first place. In ATLA's view, this decision strikes at the heart of the role of the jury in actions by injured victims.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S EXCLUSION OF EXPERT TESTIMONY OFFERED BY PLAINTIFF CONFLICTS WITH THE LANGUAGE AND INTENT OF FEDERAL RULES OF EVIDENCE 702 AND 703.

This Court promulgated, and Congress enacted, Federal Rules of Evidence 702[1] and 703[2] in an effort to liberalize the admissibility of expert testimony, ridding the law of discredited common-law restrictions. The rules require only that the expert possess sufficient specialized

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1 **RULE 702: Testimony by Experts**
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise

2 **RULE 703: Bases of Opinion Testimony by Experts**
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

knowledge (qualifications), that the testimony be of assistance to the trier of fact (relevance), and that it be based on the type of facts or data reasonably relied on by experts in the particular field (adequate basis). The decision below fashions an additional requirement, that an expert's conclusions, to be credible as a matter of law, must not conflict with a wide consensus in the scientific field. This judicial barrier to expert testimony, Amicus submits, clearly violates both the plain language and the intent of Rules 702 and 703.

Carita Richardson was born with a severely deformed left arm and no right leg. During an eight-week trial, eight expert witnesses testified that Bendectin, which Carita's mother used during pregnancy to combat morning sickness, caused these birth defects. Defendant Richardson-Merrell, the maker of Bendectin, presented a battery of experts who told the jury that Bendectin is not associated with birth defects. The jury believed plaintiff's experts and returned a verdict for plaintiff, making a specific finding that Bendectin caused Carita's deformities. The fate of that verdict raises issues of great importance far beyond the Richardsons. In an era of increased sensitivity to the hazards of drugs, pollution, a wide variety of toxic substances, the ruling makes it more difficult for victims to present to the finder of fact voices which contradict conventional wisdom in the field.

The expert testimony supporting plaintiff's case clearly met the explicit requirements of Rules 702 and 703. Neither the district court nor the court of appeals doubted the qualifications of Dr. Done and the other experts to render opinions regarding the cause of Carita's deformities. Those opinions were clearly relevant, since causation was a central issue for the jury in the trial. Finally, it is clear that these experts based their opinions on facts or data of

a type reasonably relied on by experts in the field.

The court below notes that "Dr. Done predicated his opinion upon four factors: (1) chemical structure activity analysis, (2) *in vitro* (test tube) studies, (3) *in vivo* (animal teratology studies, and (4) epidemiological studies." 857 F.2d at 829. The court made much of Dr. Done's admissions that each of the first three factors, *standing alone,* is of limited value in determining causation.[3] The core of review, however, is the following unsupported assertion:

> Studies of this kind [chemical, *in vitro,* and *in vivo,* singly or in combination, are not capable of proving causation in human beings in the face of the overwhelming body of contradictory epidemiological evidence.

Id. at 830. Clearly the court's concern was not that experts do not rely on these types of studies, but rather that Dr. Done's inferences from these specific studies contradicted other scientists opinions. This became even more apparent in the court's complaint that Dr. Done's epidemiological opinion was based on his recalculation of the data in other published studies. There was no question that the underlying data was of a type reasonably relied upon by experts -- it was relied upon by defendant's witnesses. The

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[3] *Compare, Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100, 1110 (D.C. 1986), a Bendectin suit in which plaintiff presented expert evidence similar to that in *Richardson.* The Court noted that Dr. Done relied on the combination of all four types of studies. "Like the pieces of a mosaic, the individual studies showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts: a foundation for Dr. Done's opinion that Bendectin caused appellant's birth defects."

court simply did not believe the conclusions Dr. Done drew from the data because they did not conform to the conclusions of other scientists, which were published in peer-reviewed journals. *Id.* at 831.

Although the court stated that its decision based on the inadequacy of the basis for Dr. Done's opinion under Rule 703, *id.* at 829, in reality, the court assessed the credibility of his conclusions, a function that is the province of the jury. Such a limitation is not within the plain language of Rule 703. Nor can such a restriction be grafted onto the Rule without doing violence to its intent.

The notion that the trial judge should determine whether a witness' opinion is a reasonable inference from the underlying facts was familiar to common law courts dealing with lay testimony. Dean Wigmore viewed it as a corollary to the knowledge requirement, though he stated that it should be used only rarely to exclude lay testimony. J. Wigmore, Evidence § 659(c) (3d ed. 1940). However, he condemned its use with respect to the testimony of experts in no uncertain terms:

> The inexpediency of applying the present principle (*ante,* § 659) in any but rare instances is the more apparent when a Court assumes to intrude into the technical domain of the engineer, the physician, and other scientific professional men, and to deny the possibilities of knowledge therein by refusing to listen to that which appears, to the lay understanding of the tribunal, as an incredible assertion or an unlikely inference. . . . The whole story is of the past, unpractical, and ill-founded, and is obnoxious to the modern principle of receiving whatever light can be thrown upon the issue by competent persons and then leaving their credit to

the jury.

Id. at § 662.

The purpose of Rules 702 and 703, as the Advisory Committee's Note to Rule 703 makes clear, was to broaden the admissibility of expert testimony. They do so by eliminating the judicial barriers to admitting expert testimony, entrusting to the jury, aided by vigorous cross-examination, to assess the weight of the witness. This spirit is succinctly expressed in the leading treatise on the rules: "We ought not assume the jurors are less intelligent or alert than lawyers or judges. And we ought not inhibit experts from giving us as much aid as they can." J. Weinstein & M. Berger, Weinstein's Evidence 703-29 (1988). The ruling of the court below stands in stark contradiction to the intent of the Rules.

It is also worth noting that the drafters incorporated the principle referred to by Dean Wigmore into Rule 701, governing opinion testimony by lay persons. "The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts." Weinstein & M. Berger, Weinstein's Evidence 701-18 (1988). That the drafters did not impose a similar requirement for expert testimony indicates that they intended no such barrier to expert testimony.

The district judge ruled that:

> Though Dr. Done might disagree, there is now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus. . . " 649 F. Supp. at 803.

The court of appeals upheld this rationale, adding its own view that "the drug has been extensively studied and a wealth of published epidemiological data has been amassed, none of which has concluded that the drug is teratogenic." 857 F.2d at 832.

Amicus acknowledges that the proper use of expert testimony is a problem that has long concerned courts. Sophisticated scientific techniques and theories challenge the courts in providing for the fair and orderly administration of justice. If, however, we require a change in the rules affecting the admissibility of expert testimony, this should be accomplished through the established mechanism for amending the Federal Rules which draws upon the talents of the most respected scholars and jurists in the field. *See, e.g.,* Symposium, *Rules for the Admissibility of Scientific Evidence,* 115 F.R.D. 79 (1986)(a project sponsored by the A.B.A Section on Science and Technology assessing proposed modifications of Rule 702). It should not be left to individual courts to destroy the uniformity that the Rules sought to achieve and resurrect the type of haphazard development of the law of evidence that the rulemaking process was designed to replace.

This Court has recently undertaken review of several cases in order to provide authoritative and uniform application of the Federal Rules of Evidence. *E.G., Bourjaily v. United States,* 107 S.Ct. 2775 (1987)(Rule 801(d)(2)(E); *Huddleston v. United States,* 108 S. Ct. 1496 (1988)(Rule 404(b)); *Beech Aircraft Corp. v. Rainey,* 109 S.Ct. 439 (1988)(Rule 803(8)); *Green v. Bock Laundry Mach. Co.,* 109 S. Ct. 1981 (1989)(Rule 609).

Amicus submits that this case demonstrates an equally pressing need for an authoritative pronouncement

by this Court as to the proper application of Rules 702 and 703 in federal courts.

II. THE RULING OF THE COURT BELOW THAT AN EXPERT'S INFERENCES FROM FACTS OR DATA MUST CONFORM TO SCIENTIFIC CONSENSUS CONFLICTS WITH THE APPLICATION OF THE FEDERAL RULES OF EVIDENCE IN OTHER CIRCUITS AND WITH THE HIGHEST STATE COURT.

Rule 17(a) of the Rules of this Court states that a this Court will consider review of a case on writ of certiorari

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort;

Both of these factors are present in this case.

A. THE RULING OF THE FEDERAL COURT OF APPEALS, THAT THE INFERENCES BY AN EXPERT MUST CONFORM TO SCIENTIFIC CONSENSUS, IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS.

The prevailing practice in federal courts dealing with expert testimony properly follows the command of Rule 703 to determine whether the underlying facts or data is of the type reasonably relied on by experts in the field. Where the basis so deficient experts would not rely upon it in their professional activities outside the courtroom, the trial judge may properly exclude the expert's opinion. *See,*

e.g., In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd,* 818 F.2d 187 (2nd Cir. 1987). If the underlying data meets the standard, courts follow the settled precept,

> "Credibility determinations, weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 256 (1986).

By contrast, the rule devised by the court below focusses on the expert's inferences and conclusions, as distinct from their underlying basis. Where these conclusions conflict with a broad consensus among scientists, the court holds, no reasonable jury can believe them as a matter of law.

This decision below regarding the application of Rule 703 is in direct conflict with decisions in several other circuits. A clear example is *Osburn v. Achor Laboratories, Inc,* 825 F.2d 908, 915 (5th Cir. 1987):

> Rachelle merely argues that because the notion that chloramphenicol can cause leukemia without first causing aplastic anemia has not been widely accepted in the medical field, the opinions of the Osburns' experts that Mr. Osburn's leukemia was caused by exposure to chloramphenicol provide insufficient evidence of causation.
>
> This argument misses the point. An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding. . .

> What is necessary is that the expert arrived at his causation opinion by relying upon *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions, about what caused the patient's disease.

The Fifth Circuit recently reaffirmed its adherence to this principle in *Peteet v. Dow Chemical Co.,* 868 F.2d 1428, 1433 (5th Cir. 1989).

Similarly, the Third Circuit has noted that, under Rule 703, the trial judge must scrutinize the basis for a proffered expert opinion.

> But one the court finds that the data relied upon is such as experts in the field reasonably rely upon, the rigorous examination should be conducted in the cross-examination for which Rule 705 makes explicit provision. . . . [T]he suggestion that the court must, in deciding on admissibility, carefully scrutinize the underlying assumptions, the inferences drawn, and the conclusions reached, if followed rigorously, would result in the trial court, as distinguished from the fact-finder, deciding the weight to be given to the testimony.

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 277 & 279 (3rd Cir. 1983), *rev'd on other grounds,* 475 U.S. 574 (1986).

In a large class action by Bendectin victims in the Sixth Circuit, the district judge conducted a trial solely on the causation issue, receiving testimony by some of the same experts for plaintiff who testified in *Richardson.* The court of appeals gave unqualified approval to the district judge's admission of the expert opinions and rigorous

cross-examination concerning the underlying studies, leaving it to the jury to determine credibility. Indeed, the court noted that "the jury verdict following trial here might have been for the plaintiffs instead of for the defendant." *In re Bendectin Litigation,* 857 F.2d 290, 325 (6th Cir. 1988).

Amicus submits that the decision below conflicts with those of other Circuits under Rule 703, warranting this Courts review.

B. THE RULING BY THE FEDERAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CONCERNING FEDERAL RULE OF EVIDENCE 703 IS IN CONFLICT WITH DECISIONS OF THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA.

The District of Columbia Court of Appeals in a criminal case addressed the prosecution's argument that an expert's opinion was not admissible because the conclusions she drew from her studies were rejected by other scientists.

> If, as the government implies, the results of studies about battered women must be in accord with each other and have general acceptance in the scientific community before the experts who conducted the studies can testify about them in court, we would shift to the judge such responsibility for evaluating expert credibility. . . [S]atisfaction of the third *Dyas* criterion begins -- and ends -- with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology.

Ibn-Tamas v. United States, 407 A.2d 626, 638-39, n.24 (D.C. 1979).

Consistent with that principle, in a case substantially identical to *Richardson* in its issues and evidence, the District of Columbia court reinstated a jury verdict in favor of a child born with limb defects. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100 (D.C. 1986). The court found that the four types of studies relied upon by Dr. Done, when viewed together, were a proper basis for his opinion that Bendectin causes such defects, that his methodology was generally accepted in the field of teratology, and that his qualifications were unchallenged. That the expert testimony on both sides "revealed a disagreement as to how the epidemiological and other data should be interpreted" was a "battle in which the jury must decide the issue." *Id.*at 1110. The court concluded that the trial judge's judgment n.o.v. in favor of defendant was reversible error.

Amicus submits that the decision below presents a conflict both with other Circuits and with the highest court local court regarding Rule 703, warranting this Court's review.

III. THE RULING BY THE FEDERAL COURT OF APPEALS BELOW REPRESENTS AN UNWARRANTED INTERFERENCE WITH STATE SUBSTANTIVE LAW IN VIOLATION OF THE PRINCIPLES OF FEDERALISM.

Tort law is, fundamentally, state law, an expression of policy and basic notions of justice. This Court quite recently had occasion to remind us that in our system of federalism, federal courts necessarily play a limited role

with respect to tort law, applying the law of the state which provides the basis of decision. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, No. 88-556 (June 26, 1989), slip. op. at 20. There the Court rejected the invitation to craft a common-law standard of excessiveness of punitive damage verdicts, stating that "these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between state law and federal law issues." *Id.* at 21.

That the court below characterizes its rule as "procedural," 857 F.2d at 825, n.9, does not alleviate these concerns. The line between substance and procedure shifts as the legal context changes. *Hanna v. Plumer*, 380 U.S. 460, 469 (1965). This is the case, as one court has recognized, with the rules governing expert opinion. *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986)("To the extent that the decision to allow expert testimony as a source of evidence is significantly intertwined with the underlying substantive law, we will accord it less deference.")

Strict products liability, the substantive law of this case, is a compelling example of the necessity for federal courts to avoid creating a federal common law of torts that undermines state policy. Strict liability essentially lowered the burden of proof demanded of injured victims of defective products. A scholar who was instrumental in shaping this doctrine explains that strict liability was a considered attempt to advance specific notions of justice and social policy: To relieve injured victims of the unfair and often impossible burden of proving negligent conduct by a remote manufacturer, to further public safety through a stronger deterrent to the marketing of safe products, and to impose the cost of injury upon those who are best able

to spread the risk or insure against it. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973).

Expert testimony is essential in nearly every products liability case. Plaintiffs bear not only the burden of proof, but also face the reality that many of the most qualified experts in a particular field are employed by or are otherwise dependent upon the manufacturers. One court, rejecting another judicial restriction on expert testimony, stated:

> If we were to declare as a rule of law that one must actually have practical experience in a given industry in order to qualify as an expert in litigation involving its products, we might very well place an onerous burden on plaintiffs in some cases. Where the industry is small and tightly knit, it may be difficult for the plaintiff to obtain the services of an expert currently employed therein, and it might be equally difficult to find someone who was formerly employed in the industry.

Knight v. Otis Elevator Co., 596 F.2d 84, 88 (3rd Cir. 1979).

Obviously a federal court rule that erects unduly high barriers against testimony by experts for plaintiffs involving scientifically difficult product liability cases risks undermining the very purpose for which the state adopted strict liability. Additionally, such a rule invites tort defendants to remove to federal court whenever possible, as did Richardson-Merrell in this case. Increasingly, federal courts will be placed in the anomalous position of developing state tort law in precisely those difficult cases, characterized by competing interests and policies, which should be the responsibility of state courts.

This intrusion into state tort law concerns is not necessitated by a federal legislative scheme, as in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987)(state tort action against insurer pre-empted by ERISA). Nor is it warranted by the federal interest represented by the Federal Rules of Evidence since, as argued above, the decision below is in conflict with the rules. Finally, the rule fashioned by the court below cannot be viewed as a response to those critics who view lay juries as incapable of resolving complex technical issues about which scientists themselves cannot agree. The court explicitly stated that "when the causation issue is novel and stands at the very frontier of current medical and epidemiological inquiry," the jury will continue to decide between the experts. 857 F.2d at 832. It is only the expert who challenges "near universal scientific consensus" who must not be heard by the jury. The irony is that the history of modern science, from Copernicus and Galileo to the present, has been an unbroken series of challenges to the conventional wisdom of the day.

In short, the rule below represents an unwarranted intrusion into the substantive law of the states, disturbing the delicate balance that is our system of federalism. This system is so fundamental to our system of justice that its violation is of constitutional magnitude, warranting corrective action by this Court.

CONCLUSION

For these reasons amicus urges this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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